TABLE OF CONTENTS

TOPIC 1: INTRODUCTION TO ADMINISTRATIVE LAW

1. THE BRITISH HERITAGE

A) Responsible Government

- Executive government relies for its existence on the support of the elected legislature
  - C.f. presidential system where both elective and legislature are directly elected by the people
- Collective ministerial responsibility: the executive would stand or fall as a group depending on whether they had support of the legislature
  - But with the rise of party politics and party discipline, votes of no confidence have become rare
  - Individual ministerial responsibility now provides a degree of supervision to the executive
    - Loyalty of members of the government to its policies
    - Confidentiality of cabinet deliberations etc.
    - Members of government required to provide information to parliament
    - Members of government required to take remedial steps when mistakes are made
    - Personal failure or misconduct may lead to resignation

B) Parliamentary Supremacy

- *DICEY*
  - Statute law prevails over common law
  - Parliament free to enact whatever law it chooses
  - Acts of Parliament could only be challenged on the grounds of invalidity or unconstitutionality
  - No parliament could bind its successors
- But parliamentary supremacy in the UK has been curtailed in two ways
  - EU directions prevail
  - Statement of incompatibility under the *Human Rights Act* (also Vic and ACT)

C) Rule of Law

- *DICEY*: the rule of law in England entails
  - Exercise of power is constrained by clear rules of law
    - Discretion is necessary but must not be arbitrary
    - Sovereignty of parliament must be constrained by political and social factors
  - Rules regulating government actions are enforced by ordinary rather than special courts
    - Ordinary courts are protected from external influence by the principle of judicial independence
    - Ordinary courts have jurisdiction to hear a wide range of matters
  - Rules regulating government actions are the same as those governing ordinary citizens
  - Rights of citizens are protected by ordinary law rather than a higher, constitutional law
- 'Thin' sense of rule of law
  - There should be legal norms
  - All legal norms should be open, fairly stable, clear and prospective

- It should not be impossible to comply with a legal norm
- Those having legal authority to apply or enforce legal norms should do so correctly and consistently and should be accountable for their compliance

- 'Thick' sense of rule of law
  - Includes the principles, procedures, institutions and values of the political system
    - Mere free and fair elections does not mean that rule of law operates because the judiciary might not be independent
  - Largely associated with the values of Western liberal democracies, which embody freedom from arbitrary government and respect for individuals

D) Prerogative Writs

- Writ: a document containing instructions sent by one government official to another
- Prerogative writs: those that regulate the exercise of royal power
  - Certiorari: instruction to deliver records relating to an administrative decision to a court official so that the decision could be quashed like a grape
  - Prohibition: instruction for not to make illegal decision
  - Mandamus: instruction for decision-maker to make decision according to law
- The writs were highly formulaic, and applicants had to show that they satisfied all of the procedural elements in addition to having a 'good case on the merits'
  - 1960s: dissatisfaction over the possibility of a good case failing on procedural grounds led the courts to develop equitable remedies e.g. injunction, declaration
  - 1977: procedures for applying for the prerogative writs and equitable remedies were streamlined

2. THE COLONIAL HERITAGE

A) Parliamentary Sovereignty

- When the NSW LC was established, the Chief Justice had to review the compatibility of colonial law with British law
- CLVA 1865: colonial law no longer invalid for being repugnant to English law – *Colonial Laws Validity Act 1865* (Imp) s 3
  - But the state parliaments were still not fully sovereign because
    - Legislation by paramount force preserved
      - → Colonial laws repugnant to any British Act extending to the colonies are void to the extent of the repugnancy – *Colonial Laws Validity Act 1865* (Imp) s 2
    - Rule against extraterritoriality not changed
    - Manner and form provisions – *CLVA* s 5; *AA* s 6

B) Rule of Law

- The rule of law transformed NSW from a penal colony into a free colony as free settlers increasingly demanded the curtailment of governmental and gubernatorial prerogatives
- First successful mandamus application in NSW was made in 1823
- Certiorari was used extensively in Vic but not so much in NSW and Qld

C) Responsible Government

- NSW granted responsible government in 1865 – *New South Wales Constitution Act 1865* (Imp)
  - Public officials who were not 'liable to retire … on political grounds' were to be appointed by the Governor with SEC advice rather than him alone – *New South Wales Constitution Act 1865* (Imp) s 37
- Collective ministerial responsibility more significant than individual ministerial responsibility in colonial era due to the absence of party politics

D) Prerogative Writs

- In the UK, prerogative writs against ministers were problematic because they essentially involved the Crown controlling the Crown
  - Amenability of ministerial action to UK courts was not settled until 1968
  - In Australia, the colonial courts were less reluctant to judicially review ministerial action because
    - Australia's government performed a wider range of roles than its UK counterpart, given the small population and lack of development in Australia

E) Claims against the Government

- It was once thought that the executive government was immune from liability in tort
  - This was abolished in Australian states in the 19th century
  - This rule was only abolished in England in 1947

3. FEDERATION AND ONWARDS

A) 1901-1970

- Australia does not have a unitary legal system
- The availability of appeals to the Privy Council did not imply that the state Supreme Courts were inferior to the Privy Council
- Division of powers
  - Judiciary: the federal and state legal systems are connected in three ways
    - Jurisdiction over federal law matters can be conferred to state courts
    - HCA has jurisdiction over appeals from state courts
    - PC retained jurisdiction to hear appeals from Australian matters until 1986
  - The executive and the executive have become two-layered as well
  - An independent High Court is therefore required to police the division of powers

Supremacy of Parliament

- The legislative powers of the Cth. parliament are confined by the Constitution
- The Imperial Parliament lost its power to make laws at the Commonwealth level by paramount force in 1931

- Commonwealth law prevails over state law

Rule of Law

- The HCA has original jurisdiction over matters in which a writ of mandamus, prohibition or injunction is sought against a Commonwealth officer – *Constitution* s 75(v)
  - Section 75(v) is narrower than s 75(iii) because
    - It only applies where a writ is sought against a Commonwealth officer
      - → Commonwealth officer is a person appointed by the Commonwealth to an identifiable office who is paid by the Commonwealth for the performance of their functions and who is responsible to and removable by the Commonwealth – *Broadbent v Medical Board of Queensland* [2010] FCA 980 [100]
        - * Government can evade judicial scrutiny by adopting the corporate form
        - * Non-government bodies are not captured – *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319
    - It is only available for a 'jurisdictional error'
      Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476
      Dranichnikov v Minister for Immigration and Multicultural Affairs (2003) 197 ALR 389, 407 per KIRBY J (citing *S157*)
      - → *See II Jurisdiction of the Courts > Jurisdiction by Court > HCA > Section 75(v)*
      - → *See IV Grounds of Judicial Review > Jurisdictional Errors*
  - But s 75(v) is still important because only it, not s 75(iii), constitutionally protects the three remedies against Commonwealth officers
    Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476
    Kirk v Industrial Court of NSW (2010) 239 CLR 531
    - Without s 75(v), federal judicial review would still be protected by s 75(iii), but it could be rendered meaningless by Parliament by curtailing the remedies available
- HCA has original jurisdiction over all matters in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party – *Constitution* s 75(iii)
  - No jurisdictional error is required – *Project Blue Sky Inc v ABC* (1998) 194 CLR 355
  - Section 75(iii) encompasses bodies corporate – *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319
  - Section 75(iii) contains nothing to disable the parliament from using privative clauses to exclude the HCA's jurisdiction to grant writs

Responsible Government

- Argument against responsible government: the Senate could force a government to resign even though it enjoys the support of the lower house

Separation of Powers

- In England, the separation of powers is less strict e.g. the Lord Chancellor was a judge, legislator and a minister of state
- In Australia, the adoption of responsible government also meant that the separation of powers is not perfect
  - Even so, the separation of Ch III courts from the other branches of government is quite strict

Prerogative Writs

- Even though the HCA has original jurisdiction to issue writs, in practice most applications are made in the FedCirC
- The constitutional does not outline any grounds of judicial review, and it is unclear whether any grounds of review is constitutionally entrenched
    - The grounds of judicial review are found in the common law
- Applicants for judicial review need to select their courts carefully because e.g. the jurisdiction of federal courts is narrow, as it derives entirely from statute or the Constitution

B) 1970 Onwards

Parliamentary Supremacy

- Effects of the *Australia Acts*
    - State level
        - Rule against extraterritoriality abolished – *Australia Act 1986* (Cth) s 2(1)
        - Legislation by paramount force abolished
            - → The *Colonial Laws Validity Act 1865* no longer applies to state laws made after the Act – *Australia Act 1986* (Cth) s 3(1)
            - → No new state law shall be void on the ground that it is repugnant to an English law or a UK legislation – *Australia Act 1986* (Cth) s 3(2)
        - Request and consent abolished: no British Act of Parliament hereafter shall extend to a State or to a Territory – *Australia Act 1986* (Cth) s 1
    - Federal level
        - Request and consent removed: no British Act of Parliament hereafter shall extend to the Commonwealth – *Australia Act 1986* (Cth) s 1
- Due to the principle of parliamentary sovereignty, even when the courts want to disagree with the legislature, they will do so by dressing up their judgments as a mere interpretation of the Parliament's will e.g. *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476

Rule of Law

- A constraint on both executive and judicial power

Responsible Government

- Different approaches to the giving of legal effect to ideas of responsible government
    - (Unenforceable) constitutional conventions can be adopted at (enforceable) common law – *Egan v Willis* (1998) 195 CLR 424
        - E.g. each house of a state parliament may compel the production of government documents
    - The HCA should stick closely to the words of the Constitution – *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520
- New institutions have been established to promote responsible government e.g. merits review tribunals, ombudsmen, anti-corruption bodies etc.

Separation of Powers

- Administrative Review Committee was established to address sources of public dissatisfaction

towards administrative law e.g.
  - Focus of the law on remedies at the expense of grounds of review
  - A strong case on the merits could fail on 'technical' or 'procedural' grounds due to the rigid requirements of the writs system
- The AAT, an executive body, was established because most judicial review applications raise non-justiciable issues and therefore cannot be adjudicated by Ch III courts

Prerogative Writs

- FCA established to create a new federal court to exercise judicial review jurisdiction, and
- ADJR enacted to introduce a simplified procedure of applying for judicial review
  - Advantages of an ADJR application
    - Single procedure replaced various writs
    - Shift of focus from remedies to grounds of review
    - Detailed statement of the grounds of review
    - Obligation to give reasons for decision
    - Educative purpose for administrators and lawyers
  - Problems with the ADJR
    - Did not replace the common law; s 75 applications retain the use of prerogative writs
    - Only three states have an AJDR
    - The statutory and common law grounds of review interact with each other
    - The jurisprudence of the review of immigration decisions has developed separately from that of the ADJR because of the government's belief that the FCA has become too pro-immigration
    - Introduced too much technicality into discussion of the grounds of judicial review
- The constitutionally protected minimum jurisdiction of judicial review extends to the state level – *Kirk v Industrial Court of NSW* (2010) 239 CLR 531

4. THE AMERICAN HERITAGE

- First three chapters of Australian Constitution, like its American counterpart, sets up a system of separation of powers
  - But the separation of powers is not strict
- The French model, in which special administrative courts belonged to the executive, did not offer enough separation between the branches of government

5. JUDICIAL REVIEW

- Sources of judicial review jurisdiction:
  - At the federal level, the **High Court's 'original' judicial review jurisdiction derives from the Constitution.**

- **Federal Court** shares this 'constitutional' jurisdiction by way of statute and also has sources of jurisdiction from **Administrative Decisions (Judicial Review) Act 1977 (Cth) and Judiciary Act 1903 (Cth).**
- State court has 'inherent' or 'supervisory' judicial review jurisdiction.
  - Previously thought to be sourced from Common law, but HC held in *Kirk's case* (2010) that aspects of this jurisdiction are like the HC's original jurisdiction, derived from and protected by the **federal Constitution.**

- To succeed in judicial review application, an applicant must satisfy a number of distinct requirements:
  - Court must have **jurisdiction** to judicially review the impugned act or decision and it must accept that the application raises 'justiciable' issues
  - Applicant must be an appropriate person to bring the application **(standing)**
  - Must be a breach of an administrative law norm **(ground of review)**
  - Court must have power to grant remedy
  - **No statutory restriction** on court's review jurisdiction

A) Grounds of Judicial review

- Not only must there be a source of legal authority, but government decisions must not be made in breach of an accepted administrative law norm
- Procedural grounds
  - Hearing rule: person affected by decision is given opportunity to be heard
  - Bias
- Reasoning process grounds
  - Decision-maker must consider relevant factors
  - Disregard irrelevant factors, etc
- Decisional grounds:
  - Decision-maker must have jurisdiction
  - Wednesbury unreasonableness

B) Values and the Grounds of Review

- Overarching rationale of judicial review is to keep administrative decision-makers within the legal boundaries of their powers
- All claims of governmental power must be justified in law
  - And government decisions must not be made in breach of an accepted administrative law norm
- The grounds of review are more specific than the values that judicial review seeks to protect e.g. accountability, transparency etc.
  - But even the grounds of review are best considered as principles or standards rather than specific rules
  - As they are abstract, they are capable of different interpretations
- Judges should be able to consider principles of 'good administration' because the contours of legality are not clearly defined
- Statutory interpretation will not cure the problem of statutory uncertainty
  - Non-statutory powers e.g. common law powers are even more uncertain

C) Identifying the Grounds of Review

- Common law: key question is whether an error is a jurisdictional error
  - Because some remedies e.g. prohibition and mandamus are only issued for jurisdictional errors

- If error is non-jurisdictional, a certiorari is still available if it is an 'error of law apparent on the face of the record'
- If an error is unlawful but not invalid, declaratory or injunctive relief may be available

- ADJR: 15 discrete grounds

D) Legal Basis of the Grounds of Review

- ADJR: decision must have been made 'under an enactment' i.e. the exercise of statutory powers
  - Therefore, where a decision is not made under an enactment, the grounds of review will be found in the common law
  - Therefore, only where a decision is made under an enactment, the grounds of review will be found in the ADJR Act
- Unclear as to what the legal basis for the grounds of review is
  - The question is 'open' and not yet settled
    - Common law: power to review administrative decisions is a judicial power
    - Statute: legislation that confers power to administrative powers impliedly makes compliance with administrative norms a condition for the exercise of power
      → This may be the preferred view

5. LAW/MERITS DISTINCTION

Attorney-General (NSW) v Quin (1990) 170 CLR 1 at p35-36 per Brennan J

- Facts: 1982, NSW Govt abolished Courts of Petty Sessions and transferred jurisdiction to newly established Local Courts. The Governor on advice of A-G may appoint any suitably qualified person as magistrate of Local Court. A-G announcement - stipendiary magistrates would be recommended for appointment to the new Local Courts unless they were 'unfit for judicial office'. All but 5 appointed to the new Local Courts. The 5 succeeded in JR of A-G's decision (denial of fair hearing – MacRae (1987) 9 NSWLR 268). On remittal, A-G announced a new policy – to consider the appointment of the 5 former magistrates ' on merit' i.e. on same footing as other candidates.
- Issue: Was the A-G's adoption of a policy to appoint 'on merit' was in the circumstances unfair to the 5 magistrates? Would the court be appropriate to step in and review the AG's decision?
- Decision: The High Court of Australia found in favour of the Attorney General ruling that Courts were not able to overrule government policy as the appointment of magistrates is a role of the executive. That "the court has no power to protect a person's rights against adverse decision other than enforceable rights."."Judicial review has undoubtedly been invoked to set aside administrative acts which are unjust or otherwise unlawful but only to the extent the purported exercise of power is excessive and or otherwise unlawful."
- Takeaway:
  - "The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power.
  - If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error.

- The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone."

TOPIC 2: MERITS REVIEW

- 'Merits review' is an established part of administrative law landscape, however bear in mind: all merits review is a creature of statute.
- Shared understanding – 'full'/ 'de novo' merits review:
    - reviewer is external and independent of decision-maker;
    - reviewer asks – is the decision under review 'correct and preferable', on the materials available to the reviewer and in the circumstances at the time of the review; and
    - if considers decision made is not the correct and preferable one – reviewer may exercise all the powers of the decision-maker to vary or substitute decision.
- Full/de novo 'merits review' can be contrasted with JR:
    - Wider substantive criteria ('correct and preferable' cf lawful).
    - Wider remedial powers (including to exercise the administrative power to make substitute decision).
- Merits review is only available where statute provides for it.

1. CONSTITUTIONAL CONTEXT FOR MERITS REVIEW

- At the Commonwealth Level
    - The separation of judicial power from executive (and legislative) power, as established from the structure and terms of Ch III of the Commonwealth Constitution.
    - Boilermakers case (1956)
        - 1. Some powers are exclusively judicial, and can only be exercised by Ch III courts;
        - 2. Non-judicial power cannot be vested in Ch III courts.
    - Commonly asserted merits review is an exclusively non-judicial function, and so cannot be vested in a Ch III court. But merits review could be exercised by an Executive tribunal.
    - As a consequence of being classified as part of the Executive – AAT does not benefit from the protections under Ch III (judicial tenure and remuneration under s 72), nor is constrained by the strictures of judicial power under Ch III.
- At the State Level
    - Chapter III of the Cth Constitution only applies to the States indirectly
    - Recall the operation of the incompatibility doctrine to State courts: from Kable onwards. State parliament – no strict separation of powers but cannot vest in courts, non-judicial powers that are incompatible with exercise of federal judicial power
    - More recently, an inherent supervisory function of State courts has been entrenched under the Commonwealth Constitution*: Kirk (2010).* Kirk places constraints on state legislatures. Nonetheless state bodies are not precluded from exercising both judicial and non-judicial functions. State courts can exercise merits review e.g. NSW Land and Environment Court.

2. TRIBUNALS

- Tribunals are institutions that provide merits review in Australia
- 2 points to note about tribunals:
    - Positively → tribunals are statutory bodies that provide dispute resolution, primarily through **adjudication** (similar to courts).

        - Usually disputes between citizen and government
        - Adjudication involves finding of facts, ascertainment of law, and application of law as ascertained to facts found
    - Negatively → tribunals are not courts
        - Federal courts are institutions established under Ch 3 of Constitution and stuffed by judges who hold office in accordance with s 72. Judges have security of tenure. Tenure of judges in tribunals are less secure.
- Advantages of tribunals over courts: Fair, just, economical, informal and quick (AAT Act, s 2A)
    - Expertise of tribunal members lie in subject matter of tribunal's jurisdiction, instead of expertise as a lawyer. Tribunals have been identified as 'specialists' and courts as 'generalists'
        - Migration review Tribunal and Refugee Review Tribunal
    - Speedier than courts
        - Delay may result in denial of justice, but note excessive haste in investigating and adjudicating a complex dispute can also deny justice
    - Lower Cost
        - Fees for applying to tribunals are generally lower than for claiming in courts and each party is responsible for their own costs
        - Representation is permitted (AAT Act, s 32)
        - Applicants often do not need paid representation (lawyer), but note the alarming trend that applicants who are represented fare better as a group than unrepresented applicants
    - Informal and less technical (AAT Act, s 33 (1)(b))
        - Design of hearing rooms, way adjudicators dress and interact with parties, the extent to which procedure followed is generally adversarial
        - But note that informality may be disadvantageous to claimants because the cases may not be properly ventilated, the law may not be accurately applied, and justice may not be done
        - AAT is not bound by the rules of evidence and may inform itself on any matter in such manner as it thinks appropriate (AAT Act, s 33(1)(c))

TYPES OF TRIBUNALS

- Civil/appeal tribunals
    - Civil: disputes between individuals (eg NCAT civil jurisdiction)
    - Appeal: review of decision made by a government official
- Generalist/specialist tribunals
    - Generalist: may determine appeals in many different areas of law (eg AAT)
    - Specialist: tribunal hears appeals in a particular area (eg RRT – now merged into the AAT)
- Adversarial/inquisitorial tribunals
    - Adversarial: parties determine issues, collect and present evidence
    - Inquisitorial: tribunal determines issues and collects evidence

3. COMMONWEALTH ADMINISTRATIVE TRIBUNAL: AAT

- In response to need for merits review, AAT established by Administrative Appeals Tribunal Act 1975 (Cth) commenced operation in 1976. It is an Australian exemplar of a generalist merits review tribunal.
- Current scale of operation:
    - Currently has jurisdiction under 400+ statutes;
    - Before last year's merger of Social Security, Refugee and Migration Tribunals into AAT – received 6,000 applications a year.
    - From att-G portfolio estimates 2015-16: average staffing levels 723 (members and support staff); budget $220 million.
    - Great diversity of case-law. 8 divisions: FOI; General; Migration; Disability Insurance; Security; Social Services & Child Support; Tax & Commercial; Veteran's Appeals.
- Membership and organisation
    - President: judge of the Federal Court
    - Presidential members: judges of the Federal Court
    - Deputy presidents: legal practitioners enrolled for at least 5 years
    - Senior members and other members:
        - Legal practitioners (enrolled for at least 5 years), or
        - pPersons who have special knowledge or skills

Key Provision in AAT Act:

- Section 2A – Tribunal objectives;
- S 27 – Applicants, any person whose 'interests are affected' (see also 30);
- S 33 – Tribunal Procedure (see also s 39);
- S 43(1) – Remedial powers of the Tribunal [we'll come back to]
- S 43(2) – Reasons for decision.
- S 44 – Appeals to Federal Court from AAT decisions.

Issue 1: What can the AAT review?

- **S 25 (1)(a) of AAT Act:** An enactment may provide that applicants may be made to the AAT for review of **decisions** made in **exercise of powers conferred by the enactment**
- 2 Questions to ask:
    - Does the application relate to a 'decision'?
    - Was the decision made in exercise of a power conferred by an enactment that confers jurisdiction on the AAT to review that decision?

QUESTION 1: DECISION

- **The 'decision' in s 25 includes decisions that are invalid/ineffective in law ('purported')**

Collector of Customs (NSW) v Brian Lawlor Automotice Pty Ltd (1979) 41 FLR 338	
Facts	• Lawlor's warehouse licence was cancelled by the Collector of Customs. Lawlor successfully appealed to the AAT. Collector of Customs had no power to cancel the licence. Collector of Customs appealed to the Federal Court. • Collector of Customs' arguments to Federal Court: o Collector did have power to revoke the licence

	○ If the Collector did not have power to revoke then the AAT had no jurisdiction to determine Lawlor's application
Issue	• If a decision is not in law a decision within the power conferred by the Customs Act, is it a decision for the purpose of AAT Act s 25(1)? • Did "decision" in s 25 of the AAT Act mean: ○ in pursuance of a legally effective exercise of powers conferred by the enactment [here the Customs Act]; or ○ in the honest belief there was an effective exercise of powers under the enactment; or ○ in purported exercise of the powers conferred by the enactment?
Held	• Position adopted (c) in **purported exercise of powers conferred by the enactment** •

- Tribunals can decide on question of law but cannot decide on question of law 'conclusively' (courts can)
  - Conclusive decision could be challenged only by way of an appeal
  - Non-conclusive decision can be challenged by way of judicial review or in collateral proceedings
- **S 3(3) of AAT: "Decision" means making, suspending, revoking or refusing to make an order or determination**

QUESTION 2: MADE IN EXERCISE OF POWERS CONFERRED BY AN ENACTMENT

- ADJR Act confers on Federal Court jurisdiction to review decisions made under Cth statutes subject to any express provision to the contrary
- However, AAR has jurisdiction to review a decision only if a Cth statute expressly confers jurisdiction to review a decision of that class

Issue 2: WHO CAN APPLY FOR REVIEW

- **Standing**
  - **Section 27(1):** The application may be made by or on behalf of **any person whose interests are affected by the decision**
  - **Section 30(1A):** The Tribunal may, in its discretion, make **any other person whose interests are affected** by the decision a party to the proceedings - on application by the person

Issue 3: Administrator's Reason for Decision

- **Administrative Appeals Tribunal Act 1975 (Cth), s28**
  - Request for reasons
    - by a person who is entitled to apply to the Tribunal for review of the decision
    - request is made in writing to the decision-maker
  - Reasons are to set out
    - findings on material questions of fact
    - referring to the evidence or other material on which those findings were based, and
    - giving the reasons for the decision

- AAT Act, s 37(1)
    - The administrator must lodge with the AAT:
        - a statement of reasons for decision; and
        - every other document that is relevant to review of the decision by the Tribunal
- AAT Act, s 38
    - AAT may order the administrator to lodge with the Tribunal an additional statement
- AAT Act, s 43 – AAT's decision on review
    - The Tribunal shall give reasons either orally or in writing for its decision.
    - If oral reasons are given a party may request the Tribunal to give to them a statement in writing of the reasons of the Tribunal for its decision

Issue 4: Powers of the AAT

Administrative Appeals Tribunal Act 1975 (Cth), s 43(1):
AAT may exercise all the powers and functions that are conferred by an Act on the person who made the initial decision and shall make a decision:

(a) affirming the decision under review, or
(b) varying the decision under review, or
(c) setting aside the decision under review, and
(i) making a decision in substitution for the decision so set aside; or
(ii) remitting the matter for reconsideration in accordance with any directions or recommendations of the Tribunal."

- 3 important things s 43 does:
    - Sets out powers of AAT in relation to reviewed decision
    - Provides that when AAT varies a decision or makes a substitute decision, the AAT's decision is deemed to be a decision of the original decision maker as from the date of coming into effect of the original decision
    - In reviewing the decision, the AAT 'may exercise all the powers and discretions conferred on original decision maker, i.e. AAT stands in the shoes of original decision maker

***Shi v Migration Agents Registration Authority (2008) 235 CLR** 286*	
Facts	• Mr Shi was a migration agent whose registration had been cancelled in 2003 on the basis that he had breached codes of conduct. • The AAT set aside the decision and substituted a new one, relying on evidence of Mr Shi's changed conduct between 2003 and 2005.
Issue	• Could the Tribunal rely on evidence that arose after the primary decision? YES
Held	• It was for the Tribunal to reach its own decision upon the relevant material including any new, fresh, additional or different material that had been received by the Tribunal as relevant to its decision. o Administrative decision-makers are generally obliged to have regard to the best and most current information available. o **The nature of the decision does not support the contention that review was limited to the particular time in the past when the decision was made by the primary decision-maker.**

	○ Any limitation on AAT's power to review on basis of circumstances at time of its review must be a <u>statutory limitation</u> ○ The Tribunal has been said to stand in the shoes of the original decision-maker as though it were performing the same function.

I) FOLLOWING AAT'S PREVIOUS DECISIONS?

- *Drake (No 1):* the consistent exercise of discretionary administrative power in the absence of legislative guidelines will in itself almost inevitably lead to the formulation of some general policy or rules relating to the exercise of the relevant power
- AAT must act consistently!
- Brennan J: Inconsistency is not merely inelegant, it suggests an arbitrariness which is incompatible with commonly accepted notions of justice.
- Although AAT is not bound by its own previous decision, it should aim to be consistent in its decision making, and consistently is most effectively realized by the formulation of general norms (nature of policies) to structure AAT's decision making

II) FOLLOWING GOVERNMENT POLICY?

- AAT and the original decision maker needs to take into account considerations stated expressly in statute
- However, when relevant considerations are not fully specified by statute but expressed in less formal form "policy" (i.e. general guideline, hence not binding), administrative decision makers are typically under prima facie obligation to give effect to government policy (because of ministerial responsibility).
- AAT is supposed to be standing in the shoes of the original decision maker and hence applying government policy, but can the AAT refuse to apply a lawful policy if it considers it unsound or unwise? Can the AAT can enunciate a new policy that is inconsistent with an existing policy as the basis for varying a decision?
- **<u>Government policies are relevant factors to be considered by the tribunal (Drake No. 1); however the tribunal should remain independent and should not apply unlawful or manifestly unjust policies (Drake No. 2)</u>**

Drake v Minister for Immigration and Ethnic Affairs (1979) 46 FLR 409	
Facts	• Drake is an American citizen; he commits an offence and the Minister of Immigration makes a decision to deport him. • This decision was governed by policy conclusively outlining relevant considerations: gravity of offence, likelihood of recidivism, etc.
Issue	• Should AAT follow government policy?
Held	• AAT's review criterion is: whether decision made was the **correct or preferable one,** on material before the AAT. • **AAT cannot abdicate responsibility** by merely asking whether decision conforms to whatever relevant government policy may be. AAT decision to apply a particular policy must be the result **of independent assessment of:** ○ **(i) the propriety of the policy;**

	○ **(ii) that the circumstances of the case are such that correct decision results from applying the policy** • Possible role of government policy: ○ Apply strictly without question OR ○ Disregard entirely and remain independent • No universal rule. Tribunal must weigh policy in context ○ Advantages of following policy: ▪ Policies must be applied consistently to ensure broad fairness ▪ Government policy should be followed in deference to the democratic will it presumably reflects ○ On the other hand, ▪ Inflexibly applying policy means that the merits of the individual case are not fully taken into account • Conclusion: Policy is a relevant consideration

Re Drake and Minister for Immand Ethnic Affairs(1980) ("Drake No. 2") ***

- Brennan J gives practice direction as to basis on which AAT may depart from government policy in exercising 'merits review' of discretion vested in a Minister:
  - **AAT <u>will ordinarily apply Ministerial policy</u>**
  - **Unless it is <u>unlawful or its application tends to produce an unjust decision</u> in the circumstances of the particular case**
  - An argument against applying a policy will be considered by the AAT **<u>but cogent reasons</u>** will have to be shown against its application

III) FAILURE TO PERFORM FUNCTION (RECENT CASE)

MZZZW v Minister for Immigration and Border Protection [2015] FCAFC 133	
Facts	• Applicant was an asylum seeker who was refused a protection visa by the departmental delegate and the RRT. • Applicant sought judicial review in Federal Court and succeeded – case remitted to RRT. RRT with different member reconsidered claim to refugee status. • RRT rejected applicant's claim. RRT's reasons were very similar to initial RRT member's reasons. Looked like it was copied
Issue	• Did the second RRT fail to perform its merits review function?
Held	• AAY has duty to arrive at correct or preferable decision on review according to the material before it • In SZDFZ v Minister for Immigration and Citizenship [2008], Flick J spoke of reconstituted tribunal being called upon to resolve **afresh** the claims made. ○ **<u>"Afresh" means "with fresh eyes"</u>** • Here, AAT member did not consider appellant's claim "afresh: in this manner. She listed 4 subheadings describing 4 aspects of appellants claim, 3 out of which involved substantial copying from previous decision • Result: Tribunal decision set aside

Outcomes of Merits Review

- Because federal merits review tribunals are not courts, they cannot be given power to enforce their decisions (judicial function). AAT Act establishes no such mechanism
- Some merits review tribunal decisions may be self-executing, e.g. decision affirming decision under appeal. But if it is not self-executing and decision maker fails to comply with tribunal's order, proceeding before a court would be necessary to secure enforcement
- His means that the enforcing court must '**review'** the decision of the AAT. This shows AAT's inferior status in the adjudicatory hierarchy
- Review of AAT decisions by the Federal Court
    - Appeal on a question of law (s44): "A party to a proceeding before the Tribunal may appeal to the Federal Court of Australia, on a question of law, from any decision of the Tribunal in that proceeding"

B) MERITS REVIEW IN NSW

- NSW Civil and Administrative Tribunal commenced operation 1 Jan 2014, established by Civil and Administrative Tribunal Act 2013 (NSW).
- Administrative and Equal Opportunity Division exercises administrative review jurisdiction pursuant to Administrative Decisions Review Act 1997 (NSW).

Administrative Review Act 1977 (NSW)

- **s 6 (2):** "For the purposes of this Act, a decision is made under enabling legislation if it is made in the exercise (or purported exercise) of a function conferred or imposed by or under the enabling legislation."
- **S 63 (1):** "In determining an application for an administrative review under this Act of an administratively reviewable decision, the Tribunal is to decide what the correct and preferable decision is having regard to the material then before it, including the following:
    - (i) any relevant factual material,
    - (ii) any applicable written or unwritten law."
- **S 64 Application of Government Policy**
    - (1) In determining an application for an administrative review under this Act of an administratively reviewable decision, the Tribunal must give effect to any relevant Government policy in force at the time the administratively reviewable decision was made except to the extent that the policy is contrary to law or the policy produces an unjust decision in the circumstances of the case.
    - (2) The Premier or any other Minister may certify, in writing, that a particular policy was Government policy in relation to a particular matter.
    - (3) The certificate is evidence of the Government policy concerned and the Tribunal is to take judicial notice of the contents of that certificate.
    - (4) In determining an application for an administrative review under this Act of an administratively reviewable decision, the Tribunal may have regard to any other policy applied by the administrator in relation to the matter concerned except to the extent that the policy is contrary to Government policy or to law or the policy produces an unjust decision in the circumstances of the case.

- (5) In this section:
  - Government policy means a policy adopted by:
    - the Cabinet, or
    - the Premier or any other Minister,
    - that is to be applied in the exercise of discretionary powers by administrators.

TOPIC 3: JUDICIAL REVIEW: JURISDICTION OF THE COURTS

Overview of Judicial Review:

1. **Does the Court have jurisdiction**
   a. **Which jurisdiction/s are engaged? [Topic 3]**
   b. Are there any statutory restrictions or exclusions that will prevent court exercising review jurisdiction? [Topic 10]
2. Is the decision justiciable? [not covered]
3. Does the applicant have standing? [Topic 9]
4. Is a breach of one or more of the grounds of review established? [Topics 5-8]
   a. Procedural grounds [Topic 6]
   b. Reasoning process grounds [Topic 7]
   c. Decisional grounds [Topic 8]
5. Is a remedy available? [Topic 4]

- Legality of administrative action may be raised on application for judicial review
  - State/Territory **Supreme Court** if it involves a **State**/Territory administrative action
  - **High Court/Federal Court/Federal Magistrates Court** if it involves **Federal** administrative action.